By misapprehending or misapplying the FAA, *Prima Paint*, *Casarotto* and the predecessors and progeny of *Howsam*, and by failing to apply Georgia rules of contract construction, the reviewing panel in *Jenkins II* (based on the erroneous decision in *Bess v. Check Express, Inc.*) wrongly sheds the judiciary's critical role of deciding substantive gateway issues in matters respecting single-purpose contracts entered into solely for the purpose of perpetuating the very activity that the state law of Georgia has long ago and consistently banned. Consequently, by failing to allow its federal courts to consider basic rules of contract construction principles that may invalidate the entire agreement, including the arbitration clause, the Eleventh Circuit wrongly elevates the arbitration clause to something far more than the illegal and unconscionable contracts in which they are housed can ever be. Such a rationale is contrary not only to the mandates of the FAA but also to the repeated pronouncements in *Casarotto* and *Prima Paint* that arbitration clauses are afforded "the same footing as other contracts," "but not more so." *See Casarotto*, 517 U.S. 681, 687; *Prima Paint*, 388 U.S. 395, 404.

Finally, this Petition raises issues of exceptional importance because, as it stands, the panel decision disregards the very strong pronouncement of public policy to protect Georgia citizens, like Charlene Jenkins, and thereby improperly enables payday lenders to perpetuate the very activity that no Georgia court can lend its aid. Accordingly, the state's authority and efforts to regulate matters of consumer protection is severely hampered if predatory payday lenders are allowed to circumvent the law simply by inserting arbitration clauses into an agreement that is wholly illegal and unenforceable.

I. BACKGROUND TO GEORGIA'S STRONG PUBLIC POLICY AGAINST PAYDAY LENDING ACTIVITIES.

The law in Georgia has always said that there are certain contracts—like those tending to corrupt legislation or the judiciary and wagering contracts—that are contrary to the public policy of Georgia and cannot be enforced. *E.g., Department of Transp. v. Brooks*, 328 S.E.2d 705, 711-12 (Ga. 1985). Efforts to eradicate payday lending within Georgia's borders are not a new judicial or legislative undertaking. Indeed, both our courts and the General Assembly have long ago pronounced that payday lending is an illegal practice that must be stopped. In this regard, the Georgia Supreme Court has held:

> No disguise of language can avail for covering up usury, or glossing over an usurious contract. The theory that a contract will be usurious or not according to the kind of paper-bag it is put in, or according to the more or less ingenious phrases made use of in negotiating it, is altogether erroneous. The law intends that a search for usury shall penetrate to the substance.

Pope v. Marshal, 78 Ga. 635, 640 (1887). Despite very strong judicial and legislative pronouncements against payday lending practices, payday lenders continue to thrive in Georgia.

"Payday lending" is a new name for an old practice, formerly known as "wage buying." *USA Payday Cash Advance Centers v. Oxendine*, 585 S.E.2d 924, 926 (Ga. App. 2003), *cert. denied.* The vernacular descriptions of payday lenders as "loan sharks," "street shylocks," and "wage-buyers," have also been recognized by Georgia courts and properly characterize the predatory nature of these transactions. *Freeman v. Decatur Loan & Finance Corp.*, 231 S.E.2d 409 (Ga. App. 1976). In light of the danger they pose, the payday lending trade has been the subject of repeated regulation since the

early Twentieth Century. To this end, the Georgia General Assembly, together with the other state agencies charged with policing illegal practices, have made extraordinary efforts to criminalize, cease and prosecute payday lenders that violate the law.

In 2004, the General Assembly enacted SB 157 (2004 Ga. Laws 440), which is a recodification of existing law. *See* O.C.G.A. § 16-17-1 *et. seq*. Although many of the substantive enhancements to existing law will not be applied retroactively in this case, the legislation is important and relevant to this Court's analysis because it recognizes and emphasizes Georgia's long-standing prohibition of predatory lending activities in Georgia.

With regard to payday lenders especially, the General Assembly has declared:

> (b) Despite the fact that the Attorney General of the State of Georgia has opined in Official Opinion 2002-3 entered on June 27, 2002, that payday lending is in violation of Georgia law and despite the fact that the Industrial Loan Commissioner has issued cease and desist orders against various payday lenders in the State of Georgia, the General Assembly has determined that payday lending continues in the State of Georgia and that there are no sufficient deterrents in the State of Georgia to cause this illegal activity to cease.
>
> (c) . . . . The General Assembly has further determined that payday lending, despite the illegality of such activity, continues to grow in the State of Georgia and is having an adverse effect upon military personnel, the elderly, the economically disadvantaged, and other citizens of the State of Georgia. . . . [and] declares that these types of loans are currently illegal and are in violation of Code Section 7-4-2.

> (d) Payday lending involves relatively small loans and does not encompass loans that involve interstate commerce and certain payday lenders have attempted to use forum selection clauses contained in payday loan documents in order to avoid the courts of the State of Georgia, and the General Assembly has determined that such practices are unconscionable and should be prohibited.

O.C.G.A. § 16-17-1(b)(c)&(d). To be sure that the Georgia General Assembly disapproves of payday lending, in whatever form, O.C.G.A. § 16-17-8 provides:

> The site or location of a place of business where payday lending takes place in the State of Georgia is declared a public nuisance.

Thus, despite that additional legislation continues to be passed, the General Assembly's enactment of SB 157 makes it ***crystal clear*** that payday lending has in the past violated, and in the present continues to violate, the public policy and laws of Georgia and must be stopped.

II. *JENKINS II* CONFLICTS WITH AND MISAPPLIES CONTROLLING PRECEDENT.

Where state law operates to nullify an agreement based on generally applicable contract law, the making of the underlying agreement (and necessarily all of its other parts) is a substantive issue for the courts to decide. The Court has articulated this fundamental principle several times:

> [A] gateway dispute about whether the parties are bound by a given arbitration clause raises 'a question of arbitrability" for a court to decide. . . . a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for

> the court [and] . . . . in the absence of an agreement to the contrary, issues of substantive arbitrability are for the court.

Howsam v. Dan Witter Reynolds, Inc., 537 U.S. 79, 84-85 (2002) (other citations omitted).

It is beyond any serious dispute that the single purpose of Jenkins' underlying contract (and the arbitration clause housed therein) is to perpetuate the very activity that the Georgia General Assembly long ago banned. Thus, contrary to the Eleventh Circuit's rationale, the question of arbitrability is a substantive issue and cannot be referred to an arbitrator simply because Charlene Jenkins' signature appears on a loan document that also contains an arbitration clause. The "question of arbitrability" cannot, simply in deference to the federal preference for arbitration, be passed upon by the trial court.

A. The Panel Misapplied *Prima Paint.*

The panel decision's application of *Prima Paint's* holding that "the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally" to Jenkins' claims here that both the loan agreement and the arbitration clause it houses are unenforceable is misapprehended. In *Prima Paint*, the application of fraud in the inducement did not render the underlying contract **void** as contrary to public policy. Instead, a plaintiff's allegation of fraud in the inducement renders a contract **voidable** at the election of the defrauded party. *See e.g., Gress v. Knight*, 68 S.E. 834, 835 (Ga. 1910)("Fraud does not render a contract absolutely void, but voidable."); *Cancannon v. Smith Barney*, 805 F.2d 998, 1000 (11th Cir. 1986) (distinguishing the consequences of fraud in the inducement from fraud in the *factum*). A ***voidable*** contract is not the same thing as one that is ***void*** from its inception. If an agreement is void from its inception, assent to the other terms it contains (i.e. agreements regarding

choice of law, liquidated damages, arbitration and whatnot) must also be determined. Adhering to the mandates of section 4, a court—not an arbitrator—must determine whether the making of the arbitration agreement is at issue and if so must then decide all substantive gateway issues. In this regard, *Prima Paint* does not lend support to the *Jenkins* panel's contrary conclusion.

In *Chastain v. Robinson-Humphrey Co.*, 957 F.2d 851, 855 (11th Cir. 1992)—not a payday lending case—the Eleventh Circuit recognized "*Prima Paint* has never been extended to require arbitrators to adjudicate a party's contention, supported by substantial evidence, that a contract *never existed at all*." *Id.* (emphasis supplied). As discussed *infra*, when Georgia law is applied to the contracts at issue, they are rendered "*illegal* and absolutely void" and, hence, are treated by our courts as though they *never existed at all*. *See Hanley v. Savannah Bank*, 68 S.E.2d 581, 582 (Ga. 1952). Therefore, if none of the other terms of the underlying contract can exist, neither can the arbitration clause contained among them. Importantly, *Prima Paint* does not deal with situations where, like here, strong public policy pronouncements by our courts and the Georgia General Assembly, coupled with statutory rules of contract construction, actually operate to influence the validity of the contracts that house the payday lending industry's arbitration clauses at issue here.[3]

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[3] In *Bess v. Check Express, Inc.* the Eleventh Circuit first announced it was deciding the issues only under federal law, not state law principles: "In reaching our decision, however, *we are not deciding questions of Alabama contract law;* rather, we are deciding the scope of the district court's authority under 9 U.S.C. § 4, a question of federal law." 294 F.2d at 1306 n.3 (emphasis supplied). Below, and here, Jenkins respectfully submits that the failure to consider state contract law is contrary to the requirements of § 2 of the FAA.

B. The Panel Failed To Correctly Apply the FAA and *Doctor's Associates, Inc. v. Casarotto.*

Principles of comity and federalism demand respect for a state's strong public policy and the state rules of contract construction. To this end, the FAA does not authorize arbitration where the arbitration clause is unenforceable because of generally applicable state law. Indeed, the FAA places arbitration agreements on an equal footing with all other contracts and, although the FAA embodies a strong policy in favor of arbitration, this Court has placed limits on how far a district court can reach to compel arbitration: "By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed '***upon the same footing as other contracts***.'" *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)(emphasis added). *See also Prima Paint*, 388 U.S. 395, 404 ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, ***but not more so***.")(emphasis added).

This, the reviewing panel failed to do. To the contrary, by consistently refusing to allow trial courts to consider state law contract principles, the panel decisions of *Jenkins* and the equally erroneous decision of *Bess v. Check Express, Inc.* wrongly elevate the arbitration clause to something far more than the voided contract in which it is housed can ever be. Stated differently, the decisions effectively refer to arbitration a matter that can never even be entertained by a Georgia court. Such a determination, however, is a gateway issue which, in the context of matters that are adverse to the declared public policy of Georgia, should be decided in an open forum, subject to the view of the public and media, and reported as precedent for others to follow. Under the Eleventh Circuit's approach, so long as payday lenders use arbitration clauses in their contracts neither federal nor state courts will have the opportunity to enforce the laws prohibiting usurious contracts.

C. The Arbitration Clause is "At Issue."

By referring the matter to an arbitrator, the reviewing panel failed to consider and apply precedent that squarely places ***the making of the underlying arbitration agreement in issue***. Again relying on *Prima Paint*, the Eleventh Circuit recognized in *Chastain v. Robinson-Humphrey Company, Inc.*, that assent is an essential element to the arbitration agreement and held:

> Where the allegation is one of ***ineffective assent*** to the [underlying] contract, the issue of arbitrability is not subject to resolution pursuant to an arbitration clause contained in the contract documents.

957 F.2d at 854 (quoting *Cancanon v. Smith Barney, Harris, Upham & Co.*, 805 F.2d 998, 1000 (11th Cir. 1986)). Based upon that recognition, the court in *Chastain* held that "**if the validity of the agreement to arbitrate is in issue, a district court, not a panel of arbitrators, must decide if the arbitration clause is enforceable against the parties**." 957 F.2d at 853-54 (citing *Prima Paint*, 388 U.S. at 403-04)(emphasis added). This holding was completely ignored by the panel decisions of *Jenkins II* and *Bess*. When the validity of the underlying agreement is not possible, the making of the arbitration clause housed therein is in issue and a court must decide the gateway question: *Is the arbitration clause enforceable*? The trial court, applying state law principles of contract construction, held it was not.

In *Cancannon*, the Eleventh Circuit has in fact accepted that a Plaintiff cannot be compelled to arbitrate where the underlying contract containing an arbitration clause is void from its inception due to fraud in the "factum," (i.e.—it was rendered void by operation of law): "***Under this theory, no contract existed between the parties, and the plaintiffs could not be subject to the arbitration clause contained in the documents***." 805 F.2d 998, 999 (emphasis added). The

scenario is absolutely no different in this case. If the law operates to invalidate the underlying contract, neither Jenkins nor her payday lender can assent to the terms of the underlying contract including arbitration. The invalidity of the underlying contract certainly places the making of the arbitration agreement "at issue" for the court to decide whether the arbitration clause is otherwise enforceable based on state law principles of contract construction.

D. The Panel Failed To Apply Georgia Law.

Georgia law could not be clearer that payday lending activities are criminal, illegal acts that are contrary to public policy. The passage of SB 157 in 2004 did not suddenly make payday lending activity illegal. In this regard, Georgia's rule of contract construction prevents the parties from assenting to all the terms contained within the payday lending contracts because they are nothing more than an agreement to perform a contract with a single, yet illegal, purpose—payday lending.

> The general rule of law in regard to contracts contrary to public policy is [stated] as follows: If an agreement binds the parties or either of them to do, or if the consideration is to do, something opposed to the public policy of the state or nation it is *illegal* and absolutely void, however solemnly made.

Hanley v. Savannah Bank, 68 S.E.2d 581, 582 (Ga. 1952) (emphasis supplied). This long-standing consequence remains true today. *E.g., H.G. Brown Family LTD v. City of Villa Rica*, 607 S.E.2d 883, 886 (Ga. 2005)(A contract beyond the local government's authority is *ultra vires* and null and void.); *R.R.R. Ltd. Partnership v. Recreational Services, Inc.*, 448 S.E.2d 211, 213 (Ga. 1994)("In this state, a contract to do an illegal thing is void.") (citations omitted).

> If the consideration [for a contract] is good in part and void in part, the promise will or will not be sustained,

> depending upon whether it is entire or severable.[4] If the consideration is illegal in whole or in part, the whole promise fails.

Barger v. Gardenway, Inc., 499 S.E.2d 737, 725 (Ga. App. 1998) (quoting O.C.G.A. § 13-3-45) *cert. denied*.

> A court of justice will not lend its aid to the enforcement of any contract the making of which is prohibited, nor to the enforcement of anything necessary to complete the accomplishment of an unlawful purpose.

Minor v. McDaniel, 435 S.E.2d 508, 510 (Ga. App. 1993).

Under the simple and clear principles of Georgia contract law, an illegal agreement (despite that it may also contain an arbitration clause) cannot flower into an otherwise enforceable contract. Since the underlying contract fails, so too must all of its terms, including the arbitration clause housed therein. The contrary rationale of the Eleventh Circuit is simply not what Congress could have meant by specifically directing that arbitration clauses are valid "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

III. ARBITRATORS CANNOT DECIDE SUBSTANTIVE GATEWAY LEGAL ISSUES

Respondents in opposition to this Petition will undoubtedly argue that because arbitrators are equally equipped to hear and decide the issues, courts must blindly apply the federal preference for arbitration and rid the trial courts of their obligation under the FAA. In fact, the payday lending industry and all of its Amici have already done so through their

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[4] Petitioner again notes that both the exemplar loan agreement and the exemplar arbitration clause on record lack severability clauses. Thus, whether the parties agreed that the arbitration clauses could be severed from the illegal contracts in which they are included is also a gateway issue for the court's consideration.

briefing in *Cardegna*. But whether arbitrators are equally equipped to decide the issues is not the question the Court must answer here. As stated in the opening line of this Petition, this case is not about the sanctity of arbitration. Rather, it is about whom the FAA says must decide gateway legal issues and how those gateway determinations can be made. Indeed, this is the only check the FAA has to ensure that the agreement to arbitrate is valid and otherwise appropriate.

In mandating that courts—and not an arbitrator—must decide whether the making of an agreement to arbitrate is "in issue," section 4 of the FAA requires far more of the judiciary than simply looking at the underlying agreement to verify that a signature appears and that an arbitration clause is present. That Charlene Jenkins placed her signature upon an illegal agreement does not, and under Georgia state law cannot, mean her assent to the terms it contains is effective. If the state law can operate to invalidate the underlying agreement it can also operate to invalidate the arbitration clause contained therein.

CONCLUSION

Despite the clearly pronounced criminality and illegality of their transactions, payday lenders in Georgia thrive! One way in which the Georgia General Assembly notes they are able to do so is by imposing arbitration clauses in an effort to perpetuate activity that Georgia public policy forbids and court's will not enforce. Where state law validly operates to nullify single purpose agreements to perpetuate criminal activity, the making of the underlying agreement (and all of the terms therein) is at issue, the enforceability of which must be decided by a court of law in accordance with state law contract principles that govern its enforceability. The District Court properly did this.

The Court should therefore accept Certiorari of the *Jenkins* panel decision and resolve the conflict arising between state

and federal law about whether it is the district court, or the arbitrator, that must decide if an agreement voided by operation of state law can nevertheless be enforced through arbitration.

Respectfully submitted,

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September 12, 2005

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed February 18, 2005]

No. 03–16329
D. C. Docket No. 03–00094 CV-1

CHARLENE JENKINS, And All Other Persons
Similarly Situated,
Plaintiff-Appellee,

versus

FIRST AMERICAN CASH ADVANCE OF GEORGIA, LLC,
FIRST NATIONAL BANK IN BROOKINGS,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

Before ANDERSON, DUBINA and BLACK, *Circuit Judges*.

BLACK, *Circuit Judge*:

Plaintiff-Appellee Charlene Jenkins entered into several lending transactions with Defendants-Appellants First American Cash Advance of Georgia, LLC (First American) and First National Bank in Brookings (FNB). Each time Jenkins obtained a loan, she signed an Arbitration Agreement, in which she agreed to either arbitrate or assert in a small claims tribunal, any claim she had against Defendants. The Arbitration Agreements also required Jenkins to waive her right to participate in a class action against Defendants. Nonetheless,

Jenkins filed a class action lawsuit against First American and FNB in state court, asserting the loan agreements violated Georgia usury laws. After removing the case to federal court, Defendants moved to stay the court proceedings and compel arbitration. The district court denied Defendants' motion, finding the Arbitration Agreements were unconscionable. Pursuant to 9 U.S.C. § 16(a) (2000), Defendants appealed the denial of their motion to this Court. We reverse and remand.

I. BACKGROUND

FNB is a national bank chartered under the National Bank Act, 12 U.S.C. § 21-216(d) (2000), with its principal offices in South Dakota. From September 2001 through January 2003, First American, which is located in Georgia, managed and serviced loans for FNB; however, FNB set the credit scoring criteria for the loans and funded the loans. Customers, like Jenkins, seeking to obtain a loan from FNB would fill out a loan application at First American's offices. First American would electronically transmit the application to FNB for review. FNB would analyze the loan application and make the final decision on whether or not to extend credit. If FNB approved the application, it would send a Consumer Loan Agreement, which included a Promissory Note and an Arbitration Agreement, to First American. To obtain the loan, the customer would have to sign and date both the Promissory Note and the Arbitration Agreement.

The type of lending transactions at issue in this case are commonly referred to as "payday loans." In general, payday loans are small-dollar, short-term loans with high interest rates. In such transactions, a borrower receives a modest cash advance that becomes due for repayment within a short period of time, usually about 14 days. As security for the loan, the borrower gives a check to the payday lender in the amount of the cash advance, plus the interest charged by the lender. The interest rates in payday lending transactions typically range from 20% to 30% for a two-week advance,

which computes to an annual percentage rate of about 520% to 780%. If the borrower has not repaid the lender by the due date, the lender can negotiate the check.[1] Alternatively, the borrower may be able to extend the loan's due date by paying a fee. This type of extension is referred to as a renewal or a rollover.

Between June 2002 and September 2002, Jenkins entered into at least eight payday lending transactions with First American and FNB. Each of these loans was for less than $500 and had a maturity date between 7 and 14 days. The annual percentage rates charged by Defendants for these loans ranged from a low of 438% to a high of 938.57%. Most of the loans in question charged an interest rate of about 469% annually.

Like other FNB customers, Jenkins signed and dated a Promissory Note and an Arbitration Agreement each time she took out a loan. FNB was explicitly listed as the lender in the loan documents, and First American was listed as the "loan marketer/servicer." Each Promissory Note included a choice-of-law provision, stating the note was "governed by and construed in accordance with the laws of South Dakota." The Arbitration Agreements stipulated that they were governed by the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2000), because the underlying lending transactions involved interstate commerce. Each Arbitration Agreement further stated if a court found the FAA did not apply to a particular transaction, then the Arbitration Agreement would be governed by the arbitration law of South Dakota.

The Arbitration Agreements signed by Jenkins provided that "all disputes" between the parties would be resolved by binding arbitration. They further stated Jenkins waived her right to participate in a class action against Defendants. Under

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[1] Borrowers' repayment checks were made payable to FNB and were deposited in a bank account in FNB's name.

the Agreements, Jenkins had the right to choose the arbitrator from a list of national arbitration organizations, or Jenkins and Defendants could agree on a local arbitrator. The Agreements required Defendants to advance Jenkins' arbitration costs if she submitted a written request for them to do so. The Arbitration Agreements also permitted the arbitrator to award reasonable attorneys' fees and expenses to the prevailing party "[i]f allowed by statute or applicable law."

The Arbitration Agreements provided only one exception to resolving disputes in arbitration: "All parties . . . shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction." The Agreements did, however, require appeals from the small claims tribunal to be resolved by arbitration. Therefore, by signing the Arbitration Agreements, Jenkins agreed to resolve any claim she had against Defendants by either submitting the claim to arbitration or raising it in a small claims tribunal.

The main provisions of the Arbitration Agreements were conspicuously disclosed in bold-faced capital letters:

You acknowledge and agree that by entering into this Arbitration Provision:

> (a) YOU ARE WAIVING YOUR RIGHT TO HAVE A TRIAL BY JURY TO RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES;
>
> (b) YOU ARE WAIVING YOUR RIGHT TO HAVE A COURT, OTHER THAN A SMALL CLAIMS TRIBUNAL, RESOLVE ANY DISPUTE ALLEGED AGAINST US OR RELATED THIRD PARTIES; and
>
> (c) YOU ARE WAIVING YOUR RIGHT TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY, AND/OR TO PARTICI-

> PATE AS A MEMBER OF A CLASS OF CLAIMANTS, IN ANY LAWSUIT FILED AGAINST US AND/OR RELATED THIRD PARTIES.[2]

In addition, each Promissory Note signed by Jenkins included a clause stating:

> Arbitration: You acknowledge that you have read, understand and agree to the terms contained in the Arbitration Agreement you are signing in connection with this Note. By entering into the Arbitration Agreement, you waive certain rights, including the right to go to court, to have the dispute heard by a jury (except as specifically provided in the Arbitration Agreement), and to participate as part of a class of claimants relating to any dispute with Lender, First American or their affiliates.

Jenkins nevertheless filed a class action lawsuit against First American and FNB in the Superior Court of Richmond County, Georgia. In her complaint, Jenkins alleged the payday loan agreements violate Georgia's usury statutes, Ga. Code Ann. §§ 7-4-2, 7-4-18 (2004), and the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, Ga. Code Ann. § 16-14-4 (2003).

First American and FNB removed the case to federal district court. In federal court, First American and FNB sought to enforce the Arbitration Agreements signed by Jenkins. Defendants moved pursuant to the FAA to stay the court proceedings and to compel arbitration. Under the FAA, a written arbitration provision in "a contract evidencing a transaction involving [interstate] commerce . . . shall be valid, irrev-

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[2] The class action waiver was also conspicuously disclosed at another point in the Arbitration Agreements, where it was further explained: "THE ARBITRATOR SHALL NOT CONDUCT CLASS ARBITRATION; THAT IS, THE ARBITRATOR SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE, AS A PRIVATE ATTORNEY GENERAL, OR IN ANY OTHER REPRESENTATIVE CAPACITY FOR OTHERS IN THE ARBITRATION."

ocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (2000). The FAA explains when a party to such an agreement fails or refuses to arbitrate, the other party may petition a federal district court for an order to compel arbitration. *Id.* § 4.

The district court found the payday lending transactions involved interstate commerce, and, therefore, the FAA applied. The district court, however, denied Defendants' motion to compel arbitration, finding the Arbitration Agreements were unenforceable because they were unconscionable. Defendants filed a motion to reconsider and to stay the proceedings pending this appeal. The district court denied the motion for reconsideration and granted the motion to stay the proceedings. This appeal followed.

II. JURISDICTION AND STANDARD OF REVIEW

Pursuant to 9 U.S.C. § 16(a) (2000), we have jurisdiction over this appeal. 9 U.S.C. § 16(a) (2000) (authorizing an immediate appeal of any "final decision with respect to an arbitration").[3] We review de novo the district court's denial of

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[3] In her brief, Jenkins questions whether removal was appropriate in this case and suggests federal jurisdiction does not exist. This argument, however, is without merit. In *Beneficial National Bank v. Anderson*, 539 U.S. 1, 123 S. Ct. 2058 (2003), the United States Supreme Court held actions for usury against a national bank can be removed to federal court because the National Bank Act, 12 U.S.C. §§ 85–86 (2000), preempts state usury laws in such situations. Id. at 11, 123 S. Ct. at 2064. The Court explained:

> In actions against national banks for usury, [§§ 85 and 86] supercede both the substantive and the remedial provisions of state usury laws and create a federal remedy for overcharges that is exclusive, even when a state complainant, as here, relies entirely on state law. Because §§ 85 and 86 provide the exclusive cause of action for such claims, there is, in short, no such thing as a state-law claim of usury against a national bank.

Id., 123 S. Ct. at 2064. Jenkins attempts to evade the Supreme Court's holding in *Anderson* by contending her usury claims were brought pri-

a motion to compel arbitration. *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1257 (11th Cir. 2003).

III. DISCUSSION

The parties raise, *inter alia*, the following three issues on appeal: (1) whether the district court erred in applying the FAA to the loan agreements in this case; (2) whether the district court erred in finding the Arbitration Agreements are unconscionable; and (3) whether the Arbitration Agreements are unenforceable because the underlying payday loans are illegal and void *ab initio* under Georgia law. We address each of these issues in turn.

A. *Applicability of the FAA*

The purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S. Ct. 1647, 1651 (1991). The FAA's provisions "manifest a 'liberal federal policy favoring arbitration agreements.'" *Id.* at 25, 111 S. Ct. at 1651 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)). The Supreme Court has "rejected generalized attacks on arbitration that rest on 'suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be

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marily against First American, not FNB. She argues FNB was only included in her complaint because she was seeking a declaratory judgment finding FNB to be a "sham" lender. Her complaint, however, expressly named both First American and FNB as Defendants and charged them both with usury. The complaint consistently used the plural form of "Defendants." She asserted that "Defendants violated" Georgia usury laws, and that she was "entitled to recover from Defendants all interest charges paid by [her]." Because Jenkins charged a national bank with violating Georgia usury laws, removal was proper.

complainants.'" *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89-90, 121 S. Ct. 513, 521 (2000) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481, 109 S. Ct. 1917, 1920 (1989)).

The FAA makes enforceable a written arbitration provision in "a contract evidencing a transaction involving commerce." 9 U.S.C. § 2 (2000). The FAA defines "commerce" as "commerce among the several States." *Id.* § 1. The Supreme Court has "interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 2040 (2003) (citation omitted). The Court has further explained the phrase "evidencing a transaction" means only that the transaction turns out, in fact, to have involved interstate commerce, "even if the parties did not contemplate an interstate commerce connection." *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81, 115 S. Ct. 834, 841–43 (1995).

In this case, the district court found the FAA applied because the underlying payday lending transactions involved interstate commerce. On appeal, Jenkins challenges this part of the district court's decision, contending there has been no showing that the loan agreements involved interstate commerce. Jenkins' contention is without merit.

The FAA's broad interstate commerce requirement is satisfied in this case. The lending transactions were between Jenkins, a Georgia resident, and FNB, a national bank located in South Dakota.[4] Loan applications were electronically

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[4] The district court correctly rejected Jenkins' assertion that First American, a Georgia entity, was the "true" lender. FNB was expressly listed as the lender in the loan documents, while First American was listed merely as the "loan marketer/servicer." FNB approved the loans, funded

transmitted to South Dakota, where FNB decided whether to approve or refuse the loans. If the loans were approved, FNB sent the borrowers preprinted Consumer Loan Agreements, each including an Arbitration Agreement. The district court explained: "First National Bank's role in analyzing loan applications, sending the approved loan applications, funding the loans, and accepting the loan proceeds constitutes sufficient interstate commerce to satisfy the definition of 'involving commerce' within the meaning of 9 U.S.C. §§ 1, 2." *Jenkins v. First Am. Cash Advance of Georgia*, 313 F. Supp. 2d 1370, 1373 (S.D. Ga. 2003) (citation omitted).

We agree with the district court. Here, the parties not only contemplated an interstate commerce connection when they entered into the lending agreements,[5] but the payday lending transactions did, in fact, turn out to involve interstate commerce. The district court did not err in applying the FAA to the loan agreements signed by Jenkins.[6]

B. Unconscionability

Under the FAA, a written arbitration provision is "valid, irrevocable, and enforceable, save upon such grounds as exist

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the loans, and set the credit scoring criteria for the loans. Also, repayment checks were made out to FNB and deposited in a bank account in FNB's name.

[5] The Arbitration Agreements expressly stipulated the lending transactions between Jenkins and Defendants involved interstate commerce and were governed by the FAA.

[6] We also reject Jenkins' argument that the FAA does not apply because the Georgia legislature recently made a general pronouncement that payday lending does not involve interstate commerce. *See* Ga. Code Ann. § 16-17-1(d) (2003 & Supp. 2004) (effective May 2004). Courts determine whether or not interstate commerce exists under the FAA on a case-by case analysis by examining whether the transaction in question turns out, in fact, to have involved interstate commerce. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 277-81, 115 S. Ct. 834, 841-43 (1995).

at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (2000) (emphasis added). This language has been interpreted to mean "[t]he FAA allows state law to invalidate an arbitration agreement, provided the law at issue governs contracts generally and not arbitration agreements specifically." *Bess v. Check Express*, 294 F.3d 1298, 1306 (11th Cir. 2002) (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S. Ct. 1652, 1656 (1996)). The Supreme Court has recognized that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements." *Doctors Assocs.*, 517 U.S. at 687, 116 S. Ct. at 1656. In this case, Appellant argues, and the district court found, the Arbitration Agreements signed by Jenkins are unconscionable.

In deciding claims of unconscionability, Georgia courts generally consider a variety of factors, which have been divided into procedural and substantive elements.[7] *NEC Techs., Inc. v. Nelson*, 478 S.E.2d 769, 771-72 (Ga. 1996). "Procedural unconscionability addresses the process of making the contract, while substantive unconscionability looks to the contractual terms themselves." *Id.* at 771. Factors relevant to the procedural unconscionability inquiry include the bargaining power of the parties, "the conspicuousness and comprehensibility of the contract language, the oppressiveness of

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[7] In determining whether the Arbitration Agreements were unconscionable, the district court applied Georgia unconscionability law. The choice-of-law provisions in the Arbitration Agreements stipulated that the FAA governs those Agreements, and that if a court found the FAA did not apply to a particular transaction, then South Dakota *arbitration* law would govern. Moreover, the choice-of-law provisions within the Promissory Notes provided that those Notes would be controlled by the laws of South Dakota. As South Dakota's unconscionability laws mirror Georgia's laws, the outcome of the unconscionability issue would be the same regardless of which state law applied. *See Johnson v. John Deere Co.*, 306 N.W.2d 231, 237-38 (S.D. 1981) (applying the same two-part analysis of procedural and substantive unconscionability).

the terms, and the presence or absence of a meaningful choice." *Id.* (citations omitted). As for substantive unconscionability, courts consider "the commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between the parties, and similar public policy concerns." *Id.* at 772 (citations omitted).

On the procedural side of this analysis, the district court found that Defendants had superior bargaining power and that the Arbitration Agreements constituted adhesion contracts. On the substantive side of the analysis, the court provided two reasons for finding the terms of the Agreements to be unconscionable: (1) precluding class action relief was unfair because a class action is the most effective method for borrowers with small claims to obtain relief; and (2) the Arbitration Agreements lacked mutuality of obligation because the provision providing access to a small claims tribunal would only benefit the lender, FNB.

The district court explained that considered individually, these factors might not be enough to support a finding of unconscionability, but that considered together, they rendered the Arbitration Agreements unconscionable. We disagree.

1. *Bargaining Power/Adhesion*

The district court found the Arbitration Agreements were "procedurally oppressive" because the "type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disadvantage." *Jenkins*, 313 F. Supp. 2d at 1374. The court stated "[c]onsumers who are willing to borrow money at such [high] interest rates would foreseeably sign anything." *Id.* The court further explained consumers were unable to negotiate the terms of the preprinted contracts. After a customer, like Jenkins, filled out a loan application at First American's offices, the application would be electronically transmitted to FNB. FNB would then send a completed Consumer Loan Agreement, including an

Arbitration Agreement, back to First American for the borrower to sign. The court found the contracts to be adhesive because the borrower was unable to discuss or negotiate "the amount and conditions of the preprinted agreement." *Id.*

Before considering the merits of the adhesion argument, we must first decide whether this issue is one for an arbitrator or a court to resolve. The FAA "provides a remedy to a party seeking to compel compliance with an arbitration agreement." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403, 87 S. Ct. 1801, 1806 (1967). Such a party can move the district court for an order compelling arbitration. 9 U.S.C. § 4 (2000). Section four of the FAA instructs the federal court to grant the motion and order arbitration once it is satisfied "that the making of the agreement for arbitration . . . is not in issue." *Id.* If, however, the making of the arbitration agreement is in question, then the federal court may first adjudicate that issue. *Id.*

In interpreting this section of the FAA, the Supreme Court has distinguished between claims that challenge the contract generally and claims that challenge the arbitration provision itself. *See Prima Paint Corp.*, 388 U.S. at 403-04, 87 S. Ct. at 1806. In *Prima Paint*, the plaintiff sought to rescind a contract on the grounds that the contract was fraudulently induced. *Id.* at 398, 87 S. Ct. at 1803. The defendant, on the other hand, sought to invoke the contract's arbitration clause and moved to stay the action pending arbitration. *Id.* at 398-99, 87 S. Ct. at 1803. The Supreme Court explained:

> [I]f the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the "making" of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language [of the FAA] does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. at 403-04, 87 S. Ct. at 1806. The Court concluded that because the fraudulent inducement claim related to the under-

lying contract generally, and not to the arbitration clause specifically, it was a matter to be resolved by the arbitrator, not the federal court. *Id.* at 406, 87 S. Ct. at 1807.

This Court has applied the *Prima Paint* rule to claims of adhesion and unconscionability. We have held that "[i]f . . . [the party's] claims of adhesion, unconscionability, . . . and lack of mutuality of obligation pertain to the contract as a whole, and not to the arbitration provision alone, then these issues should be resolved in arbitration." *Benoay v. Prudential-Bache Secs., Inc.*, 805 F.2d 1437, 1441 (11th Cir. 1986) (citations omitted).

Here, the adhesion arguments relied on by the district court pertain to the underlying Consumer Loan Agreements as a whole, and not to the Arbitration Agreements specifically. As explained above, the adhesion arguments were (1) that the consumers lacked bargaining power because these "type[s] of consumer loans . . . would only appeal to extremely desperate consumers," and (2) that the consumers were allegedly unable to negotiate the terms and conditions of the preprinted agreements. *Jenkins*, 313 F. Supp. 2d at 1374. These claims do not relate to the Arbitration Agreements themselves; rather, they allege the Consumer Loan Agreements, in general, were adhesive. Under the Supreme Court's decision in *Prima Paint* and our decision in *Benoay*, the FAA does not permit a federal court to consider claims alleging the contract as a whole was adhesive. We conclude, therefore, Jenkins' adhesion claims are for an arbitrator, not a federal court, to decide.

2. *Class Action Waiver*

The district court found the Arbitration Agreements were substantively unconscionable because they preclude "borrower[s] from either instigating or participating in a class action suit." *Jenkins*, 313 F. Supp. 2d at 1375. The court explained "[a] class action is the only way that borrowers

with claims as small as the individual loan transactions [at issue in this case] can obtain relief." *Id.* The district court considered the cost of attorney's fees to be a significant factor in determining whether the Arbitration Agreements are unconscionable. *Id.* The court speculated that a borrower who attempts to pursue her claim individually based on one loan transaction would "probably" be unable to obtain a lawyer on a contingent fee basis. *Id.* The district court found requiring arbitration and prohibiting class action "would have the practical effect of providing Defendants immunity." *Id.*

As an initial matter, we note this issue may be decided by a federal court. The class action waiver was a provision included in each of the Arbitration Agreements. Unlike the adhesion argument, which applies to the loan contracts generally, this claim alleges the Arbitration Agreements specifically are unconscionable because they preclude class action relief. Under section four of the FAA, a federal court may adjudicate this claim because it applies to the Arbitration Agreements themselves, and thus, it places the making of the Arbitration Agreements in issue. *See* 9 U.S.C. § 4 (2000).

We have held, however, that arbitration agreements precluding class action relief are valid and enforceable. *See Randolph v. Green Tree Fin. Corp.-Alabama*, 244 F.3d 814, 819 (11th Cir. 2001) (holding "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing class action procedures in vindicating statutory rights under TILA"). Other federal circuit courts have similarly enforced arbitration agreements despite the fact that classwide relief was unavailable. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (rejecting the borrower's argument "that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages"); *Johnson v. West Suburban Bank*,

225 F.3d 366, 369 (3d Cir. 2000) (holding arbitration "clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable"); *cf. Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 559 (7th Cir. 2003) ("The Arbitration Agreement at issue here explicitly precludes the [borrowers] from bringing class claims or pursuing 'class action arbitration,' so we are therefore 'obliged to enforce the type of arbitration to which these parties agreed, which does not include arbitration on a class basis.'") (citations omitted).

In addition, the district court's contention that consumers would likely be unable to obtain legal representation without the class action vehicle is unfounded. The Arbitration Agreements expressly permit Jenkins and other consumers to recover attorneys' fees and expenses "[i]f allowed by statute or applicable law." Under the Georgia RICO statute, a prevailing plaintiff may be awarded attorney's fees. Ga. Code Ann. § 16–14–6(c). Jenkins, therefore, can presumably recover attorneys' fees and costs if she prevails in arbitration on her Georgia RICO claim.[8] *See Snowden*, 290 F.3d at 638 (in rejecting an unconscionability argument, the court concluded the plaintiff could recover attorney fees in arbitration if she prevailed on her TILA and civil RICO claims).

Georgia courts have explained that by authorizing the recovery of attorneys' fees, the Georgia RICO statute provides plaintiffs "with effective access to the judicial process." *Dee v. Sweet*, 489 S.E.2d 823, 825 (Ga. 1997). Moreover, federal circuit courts have recognized that arbitration agreements prohibiting class action relief do not "necessarily choke off the supply of lawyers willing to pursue claims on behalf

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[8] Also, Jenkins' arbitration costs would not be expensive. Under the Arbitration Agreements, Defendants have offered to advance Jenkins' arbitration expenses, such as filing and administrative fees, if she submits a written request.

of debtors." *Johnson*, 225 F.3d at 374; *see also Snowden*, 290 F.3d at 638. These courts explained that when the opportunity to recover attorneys' fees is available, lawyers will be willing to represent such debtors in arbitration. *See Snowden*, 290 F.3d at 638; *Johnson*, 225 F.3d at 374.

Thus, precluding class action relief will not have the practical effect of immunizing First American and FNB. The Arbitration Agreements permit Jenkins and other consumers to vindicate all of their substantive rights in arbitration. We conclude, therefore, the inclusion of a class action waiver in the Arbitration Agreements did not render those Agreements substantively unconscionable.

3. *Access to Small Claims Tribunals*

The district court's finding of substantive unconscionability was also based on the provision in the Arbitration Agreements permitting either party to seek adjudication in a small claims tribunal. The court found the Arbitration Agreements lacked mutuality of obligation because this provision only benefits Defendants.

On its face, this provision does not favor one party over the other; rather, it provides that "[a]ll parties . . . shall retain the right to seek adjudication in a small claims tribunal for disputes within the scope of such tribunal's jurisdiction." The district court, however, found a borrower's ability to pursue an action in a small claims tribunal to be illusory. The court speculated that it is "hard to conceive of a claim by the payday lender that cannot be sought in a small claims tribunal," but it is "easy to envision a plethora of claims a consumer might seek which are inaccessible in [such a tribunal] due to its limited jurisdiction." *Jenkins*, 313 F. Supp. 2d at 1375. Additionally, the district court explained this provision fa-

vored Defendants because the judgments of small claims tribunals were appealable to an arbitrator.[9]

Under Georgia law, if at the time the agreement is to be enforced, "the contract contains mutual obligations equally binding on both parties to the contract, then the contract is not unilateral and unenforceable." *Jones v. Quigley*, 315 S.E.2d 59, 60 (Ga. Ct. App. 1984). In this case, both Jenkins and Defendants had equal access to small claims tribunals. The only restriction, which applied equally to both parties, was that the claims sought in such a tribunal must fall within the tribunal's limited jurisdiction.

In stating it could "envision a plethora of claims" that consumers would not be able to raise in small claims courts, the district court apparently overlooked the many claims that consumers *could* bring in such tribunals. For example, if FNB charged a consumer an interest rate higher than that agreed upon in the contract, the consumer could, in most instances, pursue an action for the difference in a small claims court. Additionally, if FNB mistakenly imposed late charges on a consumer, he could presumably seek recovery in a small claims tribunal. Thus, we disagree with the district court's unsupported speculation that the consumers' ability to pursue an action in a small claims tribunal is illusory.

We note, moreover, that the provision providing access to small claims tribunals was intended to benefit, not injure, consumers. The American Arbitration Association (AAA) has developed a set of principles, known as the Consumer Due Process Protocol, to protect consumers and ensure they are treated equitably in arbitration. *See generally* American Arbitration Association, Consumer Due Process Protocol, (Apr.

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[9] We note this claim alleged the Arbitration Agreements themselves were unconscionable due to a lack of mutuality of obligation; therefore, the district court had the authority, under the FAA, to adjudicate the issue. *See* 9 U.S.C. § 4 (2000).

17, 1998), http://www.adr.org/protocols. Principle 5 of this Protocol expressly states that consumer arbitration agreements, like those at issue here, should offer all parties the option of seeking adjudication in a small claims tribunal. *Id.* The Comment to Principle 5 explains "access to small claims tribunals is an important right of Consumers" because it provides "a convenient, less formal, and relatively expeditious judicial forum for handling . . . disputes" involving small amounts of money. *Id.* By including a provision that offers access to such tribunals, the Arbitration Agreements at issue here merely complied with the AAA's Consumer Due Process Protocol. Such compliance further undermines the district court's finding that the small-claims provision in the Arbitration Agreements only benefitted the payday lender. *Cf. Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 94-95, 121 S. Ct. 513, 524 (2000) (Ginsburg, J., concurring) (explaining the drafter of the contract could have relied on the AAA's Consumer Arbitration Rules to ensure the claims are arbitrated under a "consumer-protective fee arrangement").

We further note the district court did not provide support for its assertion that the small-claims provision favors Defendants because the judgments from small claims courts are appealable to an arbitrator. This aspect of the small-claims provision is equally binding on Jenkins and Defendants, as both parties are obligated to appeal such judgments to an arbitrator. Moreover, the arbitral forum does not unfairly favor Defendants. Jenkins, who has raised claims under Georgia usury laws and the Georgia RICO statute, is capable of vindicating all of her substantive rights in arbitration. In *Bess v. Check Express*, 294 F.3d 1298 (11th Cir. 2002), we held the terms of the arbitration agreement at issue in that case did not "grossly favor" the payday lender because, among other reasons, "nothing in the agreement prevent[ed] the arbitrator from awarding 'the full panoply of relief' available under [the applicable] law." *Id.* at 1308; *see also Green Tree Fin. Corp.*, 531 U.S. at 90, 121 S. Ct. at 521 (holding "even claims

arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its functions") (alteration in original) (citation and internal quotation marks omitted). The same is true in this case, as the Arbitration Agreements do not limit Jenkins' right to relief.[10]

We conclude the small-claims provision is mutual and bilateral—it applies equally to both parties. Jenkins has not demonstrated that access to small claims tribunals unfairly benefits Defendants. The Arbitration Agreements, therefore, do not lack mutuality of obligation.

In summary, we disagree with the district court's reasons for finding the Arbitration Agreements unconscionable. The district court did not have the authority to decide the adhesion claim because that issue related to the loan agreements generally and, therefore, should have been submitted to an arbitrator. Although the district court did have the authority to adjudicate the arguments relating to the class action waiver and the small-claims provision, those contractual conditions, for the reasons explained above, did not render the Arbitration Agreements unconscionable.

C. *Legality of the Underlying Transactions*

Jenkins raises an alternative argument for affirming the denial of Defendants' motion to compel arbitration. Jenkins argues Defendants' motion should not be granted because the underlying payday loan contracts are illegal and void *ab initio* under Georgia law. *See* Ga. Code Ann. § 16-17-1 (2003 & Supp. 2004) (effective May 2004). Because the loan contracts

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[10] We note the Arbitration Agreements also permit Jenkins to either (1) choose the arbitrator from a list of national arbitration organizations, or (2) come to an agreement with Defendants in selecting a local arbitrator.

are allegedly void, Jenkins contends "there is nothing to arbitrate."

We have, however, previously considered and rejected such an argument. *Bess*, 294 F.3d at 1304–06. In *Bess*, a class action lawsuit arose out of "check advances" or "deferred payment transactions" between the plaintiffs and defendants. *Id.* at 1300. A deferred payment transaction is essentially the same as a payday lending transaction. *See id.* at 1300-01. One of the named plaintiffs in Bess, Luna Clifton Colburn, signed an arbitration agreement in connection with the deferred payment transactions. The defendants sought to enforce this agreement and compel arbitration. Like Jenkins' argument in this case, Colburn argued the arbitration agreements were unenforceable because the underlying deferred payment transactions were void as illegal under Alabama law. Colburn alleged the loans charged usurious rates of interest, and the collection of the loans violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (2000).

In rejecting Colburn's argument, we applied the *Prima Paint* rule. *Bess*, 294 F.3d at 1304-05. We explained the "allegations of illegality go to the deferred payment transactions generally, and not to the arbitration agreements specifically." *Id.* at 1305. Therefore, an arbitrator, and not a federal court, should determine whether the underlying transactions are illegal and void. *Id.* at 1306.

In *Bess*, we also distinguished our holding from our earlier decision in *Chastain v. Robinson-Humphrey Co., Inc.*, 957 F.2d 851 (11th Cir. 1992).[11] In Chastain, we considered an "unusual" set of facts, in which the plaintiff never personally signed the customer agreements at issue. *Id.* at 852-53.

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[11] Jenkins' argument relies on a Georgia case, *Stewart v. Favors*, 590 S.E.2d 186 (Ga. Ct. App. 2003), and a Florida case, *Cardegna v. Buckeye Check Cashing, Inc.*,—So. 2d—(Fla. 2005), both of which cite this Court's decision in *Chastain*.

Without such a signature, the plaintiff argued she never assented to the arbitration clauses found within the customer agreements. *Id.* at 853. We explained:

> Under normal circumstances, an arbitration provision within a contract admittedly signed by the contractual parties is sufficient to require the district court to send any controversies to arbitration. Under such circumstances, the parties have at least presumptively agreed to arbitrate any disputes, including those disputes about the validity of the contract in *general.*

Id. at 854 (citations omitted). "Where the party seeking to avoid arbitration admittedly did not sign any contract requiring arbitration, however, 'there is no presumptively valid general contract which would trigger the district court's duty to compel arbitration pursuant to the [FAA].'" *Bess*, 294 F.3d at 1305 (quoting *Chastain*, 957 F.2d at 854) (alteration in original).

In *Chastain*, the plaintiff alleged "that a contract *never existed at all*" because she never signed and assented to the contracts in question. 957 F.2d at 855. She challenged "the very existence of *any* agreement, *including the existence of an agreement to arbitrate*." *Id.* at 854. In that situation, we held the plaintiff placed the making of the arbitration agreement in question, thereby permitting the district court to adjudicate the issue. *Id.* at 855. We concluded that before determining whether arbitration should be compelled under the FAA, the district court can decide whether the parties assented to the contracts containing the arbitration clauses. *Id.* at 855-56; *see also Bess*, 294 F.3d at 1305.

The plaintiff in *Bess*, Colburn, attempted to compare his void *ab initio* allegation to the contentions in *Chastain* that a contract never existed. 294 F.3d at 1305. We rejected this argument, explaining Colburn's reliance on *Chastain* was

misplaced because *Chastain* focused primarily "on the question of assent." *Id.* We explained:

> Colburn urges that the transactions in this case are void, not because he failed to assent to the essential terms of the contracts, but because those terms allegedly render the contracts illegal under Alabama law. At bottom, Colburn challenges the *content* of the contracts, not their *existence*. Indeed, unlike the contracts in *Chastain*, both the arbitration agreement and the deferred payment contracts were signed by Colburn, and there is no question about Colburn's assent to those contracts. Thus, this case falls within the "normal circumstances" described in *Chastain*, where the parties have signed a presumptively valid agreement to arbitrate any disputes, including those about the validity of the underlying transaction.

Id. at 1305–06. Because assent to the contracts was not in question, we applied *Prima Paint* and held that whether or not the deferred payment transactions were usurious and void was an issue to be decided by an arbitrator, not a federal court. *Id.* at 1306; *see also John B. Goodman Ltd. P'ship v. THF Constr.*, 321 F.3d 1094 (11th Cir. 2003) (holding whether or not the underlying construction contracts were unenforceable under Florida law was a question for the arbitrator to decide).[12]

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[12] Other federal circuit courts have similarly held that allegations claiming high interest loan agreements are void as illegal will not preclude the enforcement of arbitration provisions included in the allegedly illegal contracts. *See, e.g., Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("[Plaintiff's] allegations of usurious rates of interest . . . do not relate specifically to the Arbitration Agreement. Neither do they underlie a claim that [Plaintiff] failed to assent to the terms of the . . . Agreement."); *Burden v. Check Into Cash of Kentucky, LLC*, 267 F.3d 483, 489-91 (6th Cir. 2001) (holding plaintiffs' allegations that the

Jenkins' void *ab initio* argument is no different from the argument we dismissed in Bess. Jenkins assented to the payday loan contracts and the Arbitration Agreements associated with those contracts. It is undisputed that she signed and dated both a Promissory Note and an Arbitration Agreement each time she obtained a loan from FNB. Jenkins argues the payday loan contracts are void, not because she failed to assent to the terms of the contracts, but because those terms render the contracts usurious and void under Georgia law. Thus, Jenkins does not challenge the existence of either the payday loan contracts or the accompanying Arbitration Agreements; rather she challenges the content of the contracts—i.e., the rates of interest charged in the loan agreements. As we held in *Bess*, we conclude Jenkins and Defendants entered into "presumptively valid agreement[s] to arbitrate any disputes, including those about the validity of the underlying transaction." *Bess*, 294 F.3d at 1306; *see also John B. Goodman Ltd. P'ship*, 321 F.3d at 1096. We conclude, therefore, that Jenkins' void *ab initio* argument, which challenges the legality of the payday lending transactions, is an issue for the arbitrator, not the court, to decide.[13]

IV. CONCLUSION

For the reasons stated above, we conclude the district court erred in finding the Arbitration Agreements at issue in this case unconscionable and unenforceable. Moreover, Jenkins' alternative argument for affirming the district court—alleging the underlying payday lending transactions are void *ab initio* under Georgia law—is an issue for an arbitrator, not the

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high interest loan agreements were void as illegal was an issue to be decided by an arbitrator).

[13] We note this issue raised a question of federal law—namely, deciding whether the district court has the authority under the FAA to adjudicate Jenkins' claim that the payday lending transactions were illegal. *See Bess*, 294 F.3d at 1306 n.3. In deciding this federal question, we do not pass judgment on any issues of Georgia contract law. *See id.*

court, to decide. Accordingly, we reverse the district court's decision and remand with instructions to grant Defendants' motion to compel arbitration.

REVERSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
GEORGIA AUGUSTA DIVISION

[Filed Nov. 25, 2003]

Civil Action No. CV 103-094

CHARLENE JENKINS, And All Other Persons
Similarly Situated,
Plaintiffs,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, LLC,
First Defendant,

FIRST NATIONAL BANK IN BROOKINGS,
Second Defendant.

ORDER

Before the Court is Defendants' motion to stay and to compel arbitration in the captioned case. Plaintiff opposes arbitration as set forth in her somewhat tardy response to the motion.[1] For the following reasons, Defendants' motion is DENIED.

I. BACKGROUND

Plaintiff represents a proposed class of individuals who entered into loan transactions with Defendants. Between June 7, 2002 and September 6, 2002, Plaintiff completed a series

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[1] Under the Local Rules of this Court, the Court may deem the motion unopposed because of Plaintiff's untimely response. *See* L.R. 7.5, S.D. Ga. I will, however, address the merits of Defendants' motion notwithstanding the untimely opposition.

of eight loan transactions, each for less than $500 with Defendants. (Doc. No. 1, Ex. A.) A loan application for each transaction was completed at the offices of First American Cash Advance of Georgia ("First American"). Under the all encompassing terms of the loan documents, Plaintiff agreed to either arbitrate, or assert in a small claims tribunal, all claims against both First National Bank in Brookings ("First National Bank") and First American. (Doc. No. 4, Ex. C.) The arbitration agreements also requires Plaintiff to waive her right to serve

> as a representative, as a private attorney general, or in any other representative capacity, and/or to participate as a member of a class of claimants, in any lawsuit filed against us and/or related third parties.

(Doc. No. 4, Ex. D.) Plaintiff filed a putative class action suit, based on state law claims, in the Superior Court of Richmond County, Georgia. Defendants successfully removed the case to this Court. Defendants now seek to stay the court proceedings and compel arbitration pursuant to the terms of the arbitration agreement contained in each of the loan documents.

II. ANALYSIS

Plaintiff signed and dated an Arbitration Agreement each time she took out a loan with Defendants. (Doc. No. 4, Ex. D.) The Federal Arbitration Act ("FAA") makes valid any written agreement to arbitrate a dispute arising out of a transaction involving interstate commerce. 9 U.S.C. § 4. Where a party to such an agreement fails or refuses to arbitrate, the other party may move for an order compelling arbitration. *Id.* Furthermore, Section 4 of the FAA requires that the district court "must grant the motion if it is satisfied that the parties actually agreed to arbitrate the dispute." *Bess v. Check Express*, 294 F.3d 1298, 1304 (11th Cir. 2002). However, if the making of the arbitration agreement is in issue, "the court

must first adjudicate whether the agreement is enforceable against the parties." *Id.* Here, Plaintiff argues that the arbitration clause and agreement are unenforceable. Plaintiff contends first that the FAA does not apply to the underlying transaction, and second that the arbitration clause and agreement are unconscionable. The Court will address both of these arguments in turn.

A. The Application of the FAA

Plaintiff contends the loan transactions do not involve interstate commerce, thus the FAA does not apply. For the FAA to apply, the transactions must fall within the definition of "involving commerce," as defined by 9 U.S.C. §§ 1 & 2. Section 1 of the FAA defines "commerce" as "commerce among the several states." 9 U.S.C. § 1. Section 2 of the FAA expounds on Section 1, providing:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Thus, the Court must determine if the transactions and loan documents satisfy 9 U.S.C. §§ 1, 2.

Plaintiff contends that she dealt exclusively with First American and that despite the loan agreement boilerplate language First National Bank was not the lender. Yet, First National Bank, a national bank located in South Dakota, is clearly listed on both the Promissory Note and the arbitration agreement as the lender (Doc. No. 4, Exs. C, D.) Furthermore, First National Bank set all the credit scoring criteria for

the loans and approved or refused all applications. (Manning Aff. ¶ 6.) If the loan application was approved, First National Bank transmitted a preprinted "Consumer Loan Agreement" (*Id.* ¶ 8), which included an arbitration agreement signed by a representative of First National Bank. (Doc. No. 4, Ex. D.) The borrowers' checks are all made out to First National Bank and are also deposited in a bank account in First National Bank's name.

Plaintiff points to First American's ability to deposit the borrowers' checks in the bank account as proof that First American is the entity really controlling the loans. However, First American's ability to deposit checks in First National Bank's account does not show that First American is the lender. First National Bank's role in analyzing loan applications, sending the approved loan applications, funding the loans, and accepting the loan proceeds constitutes sufficient interstate commerce to satisfy the definition of "involving commerce" within the meaning of 9 U.S.C. 1, 2. *See Staples v. Money Tree Inc.*, 936 F. Supp. B56, 85B (M.D. Ala. 1996).

B. Unconscionability

The FAA makes valid any "written agreement to arbitrate a dispute arising out of a transaction involving interstate commerce, save upon such grounds as exist at law or in equity for the revocation of a contract." *Bess*, 294 F.3d at 1304. However, the state law must apply to contracts generally and not arbitrations specifically. *Id.* at 1306. Here, the Plaintiff contends that the arbitration clause and agreement are unenforceable because it is unconscionable. Since, this contention places in issue the enforceability of the arbitration agreement itself, it is an issue for this Court and not an arbitrator. *Id.*

The court must determine whether the agreement is one that under the circumstances, "no sane man not acting under a delusion would make and no honest man would take advan-

tage of." *NEC Technologies, Inc. v. Nelson*, 478 S.E.2d 769, 771 (Ga. 1996). To determine if a contract or a contract clause qualifies as unconscionable under this concept, Georgia courts generally divide the relevant factors into procedural and substantive elements. *Id.* Procedural unconscionability addresses the process of making the arbitration agreement, while substantive unconscionability looks to the arbitration terms themselves. Some factors Georgia courts have considered in determining whether a contract is procedurally unconscionable include the relative bargaining power of the parties, the conspicuousness and comprehensibility of the contract language, the oppressiveness of the terms, and the presence or absence of a meaningful choice." *Id.* at 771–72.

The type of consumer loans that Defendants offer unquestionably places the consumer at a severe bargaining disadvantage. The rates of interest the lender charged, between approximately 438.00% and 938.57% annually, would only appeal to extremely desperate consumers. (Doc. No. 1, Ex. A.) Consumers who are willing to borrow money at such interest rates would forseeably sign anything.

Furthermore, the arbitration clause in the contract and arbitration agreement are not the product of negotiation, but adhesion contracts. According to the affidavit of Robert Manning, General Counsel of First American, a customer fills out an application at the offices of First American, the application is then transmitted electronically to First National Bank, who then sends a completed consumer agreement and arbitration agreement back to First American for the consumer to sign. (Manning Aff. ¶ 7, 8.) There was no negotiation. According to Manning's affidavit, it appears the borrower was not even able to talk to the lender who determined the amount and conditions of the preprinted agreement. (*Id.* ¶ 11.) Thus, the arbitration agreement is procedurally oppressive because of the stark inequity of bargaining power.

In analyzing the substantive element of unconscionability, Georgia courts have focused on the breadth of the arbitration clause, "matters such as commercial reasonableness of the contract terms, the purpose and effect of the terms, the allocation of the risks between parties, and similar public policy concerns." *NEC Technologies*, 478 S.E.2d at 772. Here, Plaintiff alleges the arbitration agreement lacks mutuality of obligation and is therefore unconscionable because "paragraph 6 of the agreement provides for a reservation to bring action in small claims tribunals for disputes within the scope of such tribunal's jurisdiction." (Pl. Brf. in Opp. to Mot. to Stay and Compel Arbitration at 1–2.) Plaintiff's contention is that the lender receives a benefit from the access to such tribunals, and that the borrower does not. (*Id.*)

It is hard to conceive of a claim by the payday lender that cannot be sought in a small claims tribunal. Yet, it is easy to envision a plethora of claims a consumer might seek which are inaccessible in a small claims tribunal due to its limited jurisdiction. Furthermore, the borrower's ability to pursue an action in a small claims court is illusionary. According to the terms of the loan documents, the judgments of the small claims court are appealable only to an arbitrator. If a consumer brought an action in a small claims tribunal, that consumer would only be delaying the inevitable arbitration. Thus, terms of the arbitration agreement greatly favor Defendants. I find the stipulation that provides access to a tribunal that will only benefit the lender extremely troublesome. While Georgia courts have decided that mere lack of mutuality of obligation alone does not render the arbitration provision unconscionable, *Saturna v. Picklev Const. Co.*, 555 S.E.2d 825, 827 (Ga. Ct. App. 2001), and *Crawford v. Results Oriented, Inc.* 548 S.E.2d 342 (Ga. 2001), in those cases the parties bargained for the contract. As shown above, in the present case the borrower had no bargaining power.

Public policy concerns also support a finding of unconscionability. In determining whether the terms of the arbitration agreement are unfair, such terms must be examined in the context of the circumstances existing at the time the agreement was made. *Gordon v. Crown Central Petroleum Corp.*, 423 F. Supp. 58, 61 (N.D. Ga. 1976). Each arbitration clause was attached to a small loan of under $500. The arbitration agreement precludes the borrower from either instigating or participating in a class action suit. A class action is the only way that borrowers with claims as small as the individual loan transactions can obtain relief. *Leonard v. Terminix Intern Co., L.P.*, 854 S0.2d 529, 535 (Ala. 2002). The ability to pursue their grievances in small claims court as provided in the arbitration agreement is illusionary, as the lender can always appeal any judgment directly to arbitration. A borrower pursuing a claim individually based on one loan transaction against Defendants would probably be unable to procure a lawyer on a contingent fee basis, and instead would either have to face the battery of experienced defense lawyers alone or pay a lawyer by the hour. *Id.* In *Leonard*, the court reached the same conclusion as I do that the cost of attorney's fees is a significant factor in determining the arbitration agreement unconscionable. Here, prohibiting class action and requiring arbitration pursuant to an adhesion clause would have the practical effect of providing Defendants immunity. *Id.* at 536.

While there are numerous cases from the United States Supreme Court announcing a favorable disposition toward enforcing arbitration agreements, the Court has also repeatedly recognized the importance of class action relief. *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). If the arbitration agreement was the product of bargained-for terms, then the waiver of class action rights would be more palatable. However, the present arbitration agreement is an adhesion clause, does not possess mutuality of obligation, and is inaccessible because it precludes class action relief. When

considered individually, these factors might not be enough to support a determination of unconscionability, but all three grossly unfavorable terms combined are more than sufficient.

After considering both the procedural and substantive elements of unconscionability, I conclude that enforcing the arbitration clause contained in the contracts and the arbitration agreement against the payday consumers would lead to an unjust result. Therefore, the arbitration agreement arising out of the contract that requires the parties to arbitrate is unconscionable and stricken from the contract as invalid. Defendants' motion to stay and compel arbitration is DENIED.

III. CONCLUSION

For the forgoing reasons, Defendants' motion to stay and compel arbitration is DENIED.

ORDER ENTERED at Augusta, Georgia, this 25th day of November, 2003.

[ILLEGIBLE]
CHIEF UNITED STATES DISTRICT JUDGE

SUPREME COURT U.S.
FILED
OCT 14 2005
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No. 05-347

IN THE

Supreme Court of the United States

CHARLENE JENKINS,
Petitioner,

v.

FIRST AMERICAN CASH ADVANCE OF GEORGIA, INC. and FIRST NATIONAL BANK IN BROOKINGS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly applied *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), in holding, as a matter of federal law, that it was for an arbitrator, not a court, to decide whether a loan contract which contained an arbitration provision was illegal under state law and void ab initio, where the arbitration provision itself was otherwise valid and enforceable under the Federal Arbitration Act.

CORPORATE DISCLOSURE STATEMENT

Respondent First National Bank in Brookings

No publicly held corporation owns 10% or more of Respondent First National Bank in Brookings.

Fishback Financial Corporation. *Parent Company of Respondent First National Bank in Brookings. No publicly held corporation owns 10% or more of Fishback Financial Corporation.*

Respondent First American Cash Advance of Georgia, Inc.

DC Investments Trust, *Owners of First American Management, Inc.*

FA Investments, LLC, *Owner of First American Holding, LLC*

FACA of Arkansas, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

FACA of Kentucky, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

FAS Financial, LLC, *and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Alabama, LLC, *Subsidiaries of First American Holding, LLC*

First American Cash Advance of Arkansas, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Colorado, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Florida, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Georgia, LLC, *Respondent and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Kentucky, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Oklahoma, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of South Carolina, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Cash Advance of Tennessee, LLC (f/k/a Kugler, LLC), *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Financial Services, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Franchising, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

First American Holding, LLC, *Sole Member and Chief Manager for Respondent First American Cash Advance of Georgia, Inc.*

First American Investments of Georgia, LLC, *Subsidiaries of First American Holding, LLC*

First American Management, Inc., *Owner of First American Holding, LLC*

First American Tax Services, LLC, *and Subsidiaries of First American Holding, LLC*

Foresight Management Company, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

JP Investments Trust, *Owners of First American Management, Inc.*

National City Bank of Kentucky, *Successor Trustee and Owner of First American Management, Inc.*

P.A.J. Irrevocable Trust, *Owner of First American Management, Inc.*

SH Investments Trust, *Owner of First American Management, Inc.*

United Services, Inc., *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

Union Management Company, LLC, *Affiliate of Respondent First American Cash Advance of Georgia, LLC and Subsidiaries of First American Holding, LLC*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner argues that certiorari should be granted given the pendency of *Buckeye Check Cashing, Inc. v. Cardegna*, 894 So. 2d 860 (Fla. 2005), *cert. granted*, 125 S. Ct. 2937 (2005). (*See* Pet. at 3, 6). In *Cardegna*, the Florida Supreme Court held that "where a party sufficiently alleges that a contract is void for violation of Florida's usury laws, the Florida courts, and not an arbitrator, must first determine the contract's legality before a party may be required to submit to arbitration under a provision of the contract." *Id.* at 865.

In the present case, Petitioner alleges that her loan contracts were void ab initio because they violated Georgia's usury laws. Nevertheless, the United States Court of Appeals for the Eleventh Circuit, applying federal law as articulated

by this Court in *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), enforced the arbitration provisions in her loan contracts and held that an arbitrator, not a court, should determine whether the loan contracts were illegal. (Pet. at 12, 15-16). Petitioner asserts that the Court of Appeals' decision "conflicts" with *Cardegna* and asks this Court to "hold the case until the propriety of *Cardegna* is determined." (Pet. at 3).

The Petition should be denied, as *Cardegna* is a materially different case. First, the only defendant in *Cardegna* was the local lender in Florida, Buckeye Check Cashing, Inc., and the loans were not made by a national bank (or any bank constituted under federal authority). By contrast, in the present case, Petitioner obtained loans from a national bank and sued not only the local servicer of her loans, Respondent First American Cash Advance of Georgia ("First American"), but also the **national bank**—Respondent First National Bank in Brookings (the "Bank"), which was the lender. Thus, the merits of Petitioner's usury claims will be decided under the National Bank Act, 12 U.S.C. §§85-86, which completely preempts state usury law. *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1 (2003). There is **no voiding** of the loan under the National Bank Act, even if usury is proven. *Oates v. First Nat'l Bank of Montgomery*, 100 U.S. 239, 250 (1879). Therefore, it is impossible for Petitioner to "sufficiently allege," as in *Cardegna*, "that a contract is void for violation of [state] usury laws." 894 So. 2d at 865. Petitioner's "void ab initio" allegation in this case is purely illusory.[1]

Second, *Cardegna* was wrongly decided because the Florida Supreme Court misapplied *Prima Paint, supra*. In *Prima Paint*, this Court held that under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, challenges to the validity of a contract containing an arbitration provision must be decided

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[1] As discussed in note 9 *infra*, the fact that Respondent First American is not a national bank does not alter this conclusion.